STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2006
v	No. 257586 Wayne Circuit Court
CHARLES QUINCY JONES, Defendant-Appellant.	LC No. 04-004076-01

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83, and was sentenced to 12 to 18 years' imprisonment. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from an incident in 2004 in which he ordered the complainant, who lived with him at the time, out of his home. When the complainant refused, defendant told her "you got to die." Defendant grabbed the complainant's neck with both of his hands, twisted it hard, and broke her neck. Defendant testified that he pulled the complainant by her hair towards the front door. According to defendant, the complainant's neck broke because he pulled her by the hair toward the front door and she resisted by pulling her head in the opposite direction. Defendant testified that he never intended to kill or injure the complainant.

After conducting a due diligence hearing, the trial court declared the complainant unavailable at trial. The prosecution then read her preliminary examination testimony into the record. At the hearing, the investigator in charge of the case testified that she did not believe the complainant would be a difficult witness to keep track of due to the severity of her injuries. The investigator started looking for the complainant shortly after the preliminary examination and approximately one-and-a-half months before trial. The investigator testified that she visited addresses the complainant had given her, talked to friends and relatives, contacted local utility companies, jails, government agencies, morgues, and hospitals. In addition, the investigator had officers run surveillance on the addresses that complainant had given her and, two weeks before trial, requested a material witness detainer.

Defendant first argues on appeal that the trial court committed reversible error in allowing the prosecution to read into the trial record the complainant's preliminary examination

testimony because the prosecution did not exercise due diligence in attempting to locate the complainant.

The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion occurs when a result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance of it. *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005).

A trial court may allow former testimony in a proceeding when the declarant of the testimony is unavailable as a witness. MRE 804(b)(1); MCL 768.26; *People v James (After Remand),* 192 Mich App 568, 571; 481 NW2d 715 (1992). Michigan Rule of Evidence 804(a)(5) states that a declarant is unavailable when the declarant "is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown."

The test for whether a party exercised due diligence in attempting to procure a witness' attendance at trial is one of reasonableness, that being diligent good-faith efforts, not whether more stringent efforts would have produced it. *Barber v Page*, 390 US 719, 724-725; 88 S Ct 1318; 20 L Ed 2d 255 (1968); *James, supra*. In addition, due diligence is based on the particular facts of a case and not upon any set standard. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1988).

In this case, the trial court heard testimony that a good faith, due diligent effort was made by the prosecution to find the complainant. Based on the testimony heard at the due diligence hearing, an unprejudiced person could not say there was no justification for the court's decision, or that its decision was violative of fact and logic. *Meshell, supra*. The trial court did not abuse its discretion in finding due diligence on behalf of the prosecution.

Defendant next contends he was denied a fair trial when the trial court refused to give the jury a requested instruction on accident. A trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005).

The trial court is required to instruct the jury concerning the law applicable to the case, and fully and fairly present the case to the jury in an understandable manner. MCL 768.29; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995). A criminal defendant has the right to have a properly instructed jury consider the evidence against him. *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000).. When a defendant requests a jury instruction on a theory or defense and there is evidence to support the theory, the trial court must instruct the jury on the defense theory. *Hawthorne, supra* at 51. A trial court is required to give a requested instruction except where the theory is not supported by the evidence. *People v Stapf,* 155 Mich App 491, 499; 400 NW2d 656 (1986).

In the instant case, defendant requested an accident instruction. But the trial court found, after viewing the evidence in a light most favorable to defendant, that it did not support his request for an accident instruction. Defendant, in his testimony, stated that he did not intend to

hurt the complainant. However, he did admit to pulling complainant by her hair in an attempt to forcibly remove her from his home. At no point did he claim that his actions were accidental.[1] To say that the complainant broke her neck by accident defies the evidence presented in this case.

The defense did not raise the theory of accident and the evidence did not support the giving of an accident instruction. Based on the evidence produced at trial, an unprejudiced person could not say there was no justification for the court's decision, or that its decision was violative of fact and logic. *Meshell, supra*. The trial court did not abuse its discretion in refusing to give an accident instruction.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

[1] Defendant's theory that he lacked the specific intent to kill is distinct from an accident theory. Hence, the trial court was mistaken when it ruled that the specific intent instruction covered the accident instruction as well. See *People v Lester*, 406 Mich 252, 253; 277 NW2d 633 (1979); *Hawthorne, supra*; *People v Hess*, 214 Mich App 33; 543 NW2d 332 (1995). The Court in *People v Ora Jones*, 395 Mich 379, 394; 236 NW2d 461 (1975) *overruled on other grounds by People v Cornell*, 466 Mich 335, 646 NW2d 127 (2002), explained that, for the instructions to be fairly and fully presented to the jury in an understandable manner, a separate accident instruction must be given in addition to the specific intent instruction. We hold that the trial court's erroneous ruling that the accident instruction was covered by the specific intent instruction does not require reversal because the evidence did not support an accident theory, as noted by the trial court, which is reason alone to deny an accident instruction.